BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 16

READT 014/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	STUART DAVIDSON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1906) First Respondent
AND	MICHAEL ROBB and HASTINGS McLEOD LIMITED Second Respondents
Hearing:	17 February 2021, by AVL (further written submissions filed after the hearing)
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Ms B Entwistle, on behalf of Mr Davidson Ms S Shaw and Ms L Lim, on behalf of the Authority Ms K Harkess and Ms M Braddock, on behalf of Mr Robb
Date of Decision:	12 April 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Davidson has appealed against the decision of Complaints Assessment Committee 1906 ("CAC 1906"), issued on 20 April 2020, to take no further action on his complaint against Mr Robb and Hastings McLeod Ltd ("the Agency").

Background

[2] Mr Davidson owned and ran a family dairy farm in Westland ("the property"). In January 2018 he suffered a stroke and resulting brain injury, and was admitted to Grey Base Hospital on 28 January 2018. He was discharged on 15 February 2018. All relevant events occurred between January and June 2018.

[3] Mr Robb is a licensed salesperson, engaged by the Agency. He had also been Mr Davidson's farm advisor for a period of four years. He was advised of Mr Robb's stroke by one of Mr Davidson's daughters, Ms Parker, on 29 January.

[4] Ms Parker and another daughter, Ms Meyer, stepped in to run the property. They approached Mr Davidson's bank to secure finance to employ a farm manager for a period, of four months (until the end of the current milking season) as it was expected that Mr Davidson would not be well enough to work for some three to six months. A bank file note dated 13 March records, among other things, that it was likely that there would need to be a plan in place (likely to be selling the property), and that the outcome would be that the property would need to be listed for sale.

[5] On 5 February, there was a meeting at the hospital involving Mr Davidson, his family, and medical staff. Mr Davidson's daughters arranged for Mr Robb to visit him in hospital on 9 February, to discuss the future of the property. Mr Davidson's daughters and a representative of the West Coast Rural Support Trust, Mr Berry, were also present. A decision was made to sell the property. Mr Davidson said that he made this decision reluctantly, on the understanding that the property would be advertised nationwide. He said Mr Robb responded that he would attend to that.

[6] Over the period of his hospital admission, Mr Davidson was recorded in the hospital's clinical notes as having deficits in vision and visual perception, motor functioning, balance, memory and learning, and showing confusion. The Tribunal was advised that there was a discussion as to whether an Enduring Power of Attorney ("EPA") executed by Mr Davidson should be invoked, but medical staff considered that there was no basis for doing so. We have not been able to find any reference in the clinical notes to this advice having been given.

[7] While Mr Davidson was in hospital, a local farmer, Mr Tapp, contacted Mr Davidson's daughters and said he might be interested in buying the property. They told him that Mr Robb would be marketing it, and he contacted Mr Robb. During the investigation of the complaint, Mr Tapp told the Authority's investigator that he knew of Mr Robb, but had never spoken with him one-on-one before this transaction

[8] On 15 February, Mr Davidson entered into an agency agreement to list the property for sale with Mr Robb. He was taken out of hospital and signed the agency agreement at Mr Robb's brother's house. Mr Robb provided Mr Davidson with a written appraisal of the property (dated 14 February) at $1.35 million, with a selling range of $1.3m to $1.5m. Mr Robb recommended a sale by tender. The rateable valuation of the property (as at 1 September 2017) was $1.93m.

[9] Mr Robb showed Mr Tapp the property on 16 February. On 23 February, Glenmark Farms Ltd (Mr Tapp's company) signed an agreement for sale and purchase, pursuant to which it offered to purchase the property for $1.6m. Mr Robb forwarded the offer to Mr Davidson's solicitor, Mr Stobie, and one of his daughters. Mr Robb also advised Mr Davidson of the offer. On 26 February, Mr Davidson's solicitor advised Mr Robb that he was seeing the family the following day, and would get back to Mr Robb after they had checked some matters.

[10] On 27 February, Mr Robb advised Mr Stobie that following a discussion with one of Mr Davidson's daughters, he had sounded out Mr Tapp as to whether he was open to negotiation, and that his response was "no". Mr Robb also sent Mr Stobie a revised wording for clause 21.0(iii) in the agreement for sale and purchase, which he said he had discussed with Mr Davidson and his daughters.

[11] Mr Davidson signed and initialled the agreement for sale and purchase (including the handwritten revised wording of cl 21.0(iii)) on 28 February, in Mr Stobie's presence. It was counter-signed by the purchaser on 7 March, and made unconditional on 18 April. The sale and purchase was settled on 11 June 2018.

[12] On 18 May 2018, Mr Davidson complained to the Authority that Mr Robb:

[a] had a conflict of interest (acting both as farm advisor and agent);

[b] failed to act in his interests (by ignoring the state of his health or taking advantage of it);

[c] failed to advertise the property for sale despite his having asked him to do so; and

[d] applied pressure on him to accept the purchaser's offer.

[13] Complaints Assessment Committee 1903 ("CAC 1903") conducted an inquiry into the complaint, and in a decision issued on 28 August 2019 decided to take no further action on it. Mr Davidson appealed to the Tribunal. In a decision issued on 20 December 2019, the Tribunal allowed the appeal and referred the matter back to CAC 1903 for reconsideration.[1] The Tribunal was satisfied that due to an administrative error, CAC 1903 was not made aware of a number of documents, including Mr Davidson's direct response to questions from the Authority's investigator, and a number of references he had provided in support of his complaint.

Complaints Assessment Committee 1906's decision

[14] In a decision issued on 20 April 2020, CAC 1906 ("the Committee") determined to take no further action on Mr Davidson's complaint. It found that no conflict of interest existed, and the fact that Mr Robb had been Mr Davidson's advisor may have been an advantage, as he would have known the property, its features, and business

1 *Davidson v Real Estate Agents Authority (CAC 1903)* [2019] NZREADT 61.

details.[2] It also found that while it seemed "there was some cognitive impairment resulting from the stroke", Mr Robb was not alerted to it, and it was not apparent to him.[3]

[15] The Committee also found there was no evidence to suggest that Mr Robb deliberately did not advertise the property for his own advantage, and Mr Davidson decided to accept the purchaser's offer following a discussion with Mr Robb, his family, and advisers, and signed the offer in the presence of his solicitor. It further found that while the whole situation was pressured, it had no evidence to suggest that Mr Robb applied pressure on Mr Davidson to sell the property under value, and he had five days after receiving the offer before signing it at his solicitors office.[4]

[16] The Committee decided to take no further action on a complaint that the general manager of the Agency, Mr Moore, was dismissive of Mr Davidson's complaint. It found there was no evidence that Mr Davidson had made a complaint to the Agency.[5]

The appeal

[17] In respect of the findings on his complaint against Mr Robb, Mr Davidson has appealed on the grounds that (in summary) the Committee:

[a] failed to make a finding as to Mr Davidson's likely mental state following his stroke, and his contractual capacity, despite medical evidence of his incapacity;

[b] erred in determining that Mr Robb did not breach rr 9.1, 9.2, and 9.8 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), by

[i] failing to undertake a proper competency assessment of Mr Davidson,

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2 Committee's decision, at paragraphs 5.1–5.3.
3 At paragraphs 5.4–5.14.
4 At paragraphs 5.15–5.19 and 5.20–5.24.
5 At paragraphs 5.25–5.28.

[ii] failing to follow Mr Davidson's instructions to market the property nationally, and

[iii] pressuring Mr Davidson to accept the first offer on the property without allowing him sufficient time to properly consider his position;

[c] disregarded relevant factors which should have been considered when appraising the value of the property; and

[d] took into account irrelevant factors: namely, the lack of statements from Mr Davidson's family.

[18] Mr Davidson has not appealed against the Committee's decision to take no further action on his complaint regarding the Agency's response to his complaint.

Further evidence admitted on appeal

[19] Pursuant to a ruling issued on 9 October 2020, the Tribunal allowed an application by Mr Davidson to submit Grey Base Hospital clinical notes relating to Mr Davidson (dated from 29 January to 12 February 2018) ("the clinical notes"), an email and attached statement by Mr Davidson's daughter, Ms Wendy Meyer, and a report from a registered clinical psychologist, Mr John Kennedy, dated 29 June 2019.[6]

The application of rr 5.1 and 9.8

[20] The Tribunal is required to consider the application of rr 5.1 and 9.8 of the Rules. This issue arises out of Ms Entwistle's submission for Mr Davidson that licensees' duties of care to their clients include a responsibility to be alert at all times to the question whether clients have the capacity to give instructions, and that if licensees have reasonable grounds for concern about clients' understanding of transactions, the Rules compel them to take care when dealing with those clients. Ms Harkess

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6 *Davidson v Real Estate Agents Authority (CAC 1906)* [2020] NZREADT 48.

challenged that interpretation of the Rules. The Tribunal therefore requested further submissions on the point, in particular, the relationship of rr 5.1 and 9.8.

[21] Rules 5.1 and 9.8 provide:

> **5 Standards of professional competence**
>
> 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
>
> …
>
> **9 Client and customer care**
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> …
>
> 9.8 A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
>
> …

Submissions

[22] Ms Harkess submitted that r 5.1 is a general rule addressing "how" licensees conduct themselves when carrying out real estate agency work, with the object of preventing licensees from failing to meet minimum levels of competency in their professional work, and r 9.8 is directed at "what" licensees do, with the object of preventing licensees from engaging in particular conduct, namely taking advantage of a prospective client, client, or customer's inability to understand documents. She submitted that an interpretation of r 5.1 that would prescribe "what" a licensee must do, such as "to consider and verify a client's competency when carrying out real estate services" changes the object of the Rule from requiring a standard of care to be upheld to requiring a licensee to take a specific action.

[23] Ms Harkess submitted that if r 5.1 is interpreted in the way asserted by Ms Entwistle, r 9.8 is in direct conflict with r 5.1 when client competency is in issue. She submitted that a licensee would have an onerous duty under r 5.1 to be alert to and verify a client's competency (even if incompetence is not reasonably apparent), but a limited duty under r 9.8 not to take advantage of a reasonably apparent inability to understand relevant documents.

[24] She further submitted that the two Rules would not be capable of standing together unless r 9.8 is read down to apply only to non-clients and/or where the client's inability to understand is not related to competency (for example, because of language, comprehension, or sophistication difficulties). She submitted that for rr 5.1 and 9.8 to work together in practice, they must be construed to give effect to both Rules, applying the principle that r 5.1 does not override r 9.8.

[25] Ms Harkess accepted that the overarching nature of the application of r 5.1 to real estate agency services means that it can also apply when a specific rule (such as r 9.8) has been breached. However, she submitted, the breaches would be for different reasons: r 5.1 would be contravened because of how the licensee acted (without reasonable care), while r 9.8 is breached because of what the licensee did (taking advantage of a consumer's reasonably apparent inability to understand relevant documents).

[26] Ms Entwistle submitted that the limitation on r 5.1 put forward by Ms Harkess is illogical. She submitted that the question whether a licensee has acted with reasonable skill, care, competence, and diligence cannot be determined without having recourse to the licensee's conduct in a particular context: that is, what the licensee did or did not do. She submitted that in the present case, an assessment of Mr Robb's conduct (what steps he took in the circumstances of the case) is central to the assessment whether he complied with rr 5.1 and 9.8.

[27] Ms Entwistle submitted that rr 5.1 and 9.8 are complementary, and impose separate obligations: if there is no breach of r 9.8, then it does not follow that r 5.1 has not been breached. She submitted that the fact that both Rules may be applied in contexts where competency is in issue does not alter their independent application. She submitted that r 5.1 sets the overarching standard of professional skill, care, competence, and diligence, and there is no logical reason why the application of the general rule should be curtailed by a Rule that is "more specific".

[28] She submitted that on Ms Harkess's approach, the duty encompassed by r 5.1 is unduly restricted to the extent that it is rendered trivial and undermines the consumer protection purposes of the Act. She submitted that all of the Rules in section 9 of the

Rules, under the heading "Client and Customer Care" could be said to be "more specific" than r 5.1, but all of the Rules still apply.

[29] On behalf of the Authority, Ms Lim submitted that r 5.1 sets out a general standard of competence, encompassing any conduct arising in the course of carrying out any aspect of real estate agency work. She submitted that the specific obligations of requirements of a licensee under r 5.1 will depend on the circumstances of the case. She submitted that r 9.8 is a specific rule, recognising that there is often an "imbalance of power" between licensee and customer, and is aimed at managing the inherently disadvantageous position a consumer may be in.

[30] With respect to the present case, Ms Lim submitted that Ms Entwistle's submission that r 5.1 requires a licensee to take steps to assess the competence and capacity of every prospective client, client, or customer is overly onerous on licensees. She submitted that an obligation to ascertain capacity of a prospective client, client, or customer will only arise where licensees are reasonably (that is, objectively ought to be) on notice that there may be an issue as to capacity.

[31] She submitted that where licensees are on notice of a customer's potential capacity issue, they might be expected to take steps such as seeking medical confirmation as to fitness, ensuring the customer has legal representation, or even declining to act. The extent of licensees' obligations would be determined on the facts of each case.

[32] Ms Lim submitted that r 9.8 is "outcome focussed" and is triggered at the point where there has been an outcome arising from a customer's inability to understand relevant documents. She submitted that at that point the licensee's breach of r 5.1 becomes less pertinent, as the licensee's conduct is encapsulated in the assessment of whether a capacity issue was "reasonably apparent". She accepted that there will often be overlap in obligations arising under rr 5.1 and 9.8.

[33] Ms Lim submitted that in the present case, the key issue is whether it was reasonably apparent to Mr Robb that there might be a risk that Mr Davidson lacked capacity. She submitted that as Mr Davidson entered into an agency agreement, the

focus ought to be on compliance with r 9.8, and whether there were flags that should have put Mr Robb on notice, such that further steps or enquiries were required, and whether he took the required steps to satisfy himself of Mr Davidson's capacity.

Discussion

[34] Rule 5.1 is a rule of general application. It sets a basic standard of skill, care, competence, and diligence that must be applied by licensees in all aspects of their real estate agency work. Rule 9.8 has a specific application: it applies when it is reasonably apparent that a prospective client, client, or customer is unable to understand relevant documents. If such an inability is "reasonably apparent" to a licensee, the licensee must not take advantage of it.

[35] Counsel referred to two recent decisions of the Tribunal in which the relationship between r 5.1 and specific Rules was discussed. In *Deng v Real Estate Agents Authority (CAC 1901)*, the Tribunal considered a licensee's conduct as to advising as to the risk of a client being liable for double commission.[7] The relevant obligation is set out in r 9.10. The licensee advised the vendors of a property (who had told him they previously had a general agency agreement with a different agency) as to the circumstances in which they could be liable to pay commission to more than one agency, but he had not asked to view the prior agency agreement so as to satisfy himself that it was indeed a general agency (it was a sole agency). A Complaints Assessment Committee found that the licensee had breached r 5.1, but had complied with the provisions of r 9.10.

[36] On appeal, the licensee accepted that rr 5.1 and 9.10 impose separate obligations, but submitted that if the specific requirements of r 9.10 were complied with, then the general obligation under r 5.1 had also been complied with. The Tribunal did not accept that submission. It said that the consumer protection purposes of the Act must be borne in mind, and r 5.1 applies to the consideration of whether the licensee had sufficient information on which to give the required explanation, and whether the explanation was adequate.[8]

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7 *Deng v The Real Estate Agents Authority (CAC 1901)* [2020] READT 07.
8 *Deng*, at [35] and [41].

[37] In *Molloy v The Real Estate Agents Authority (CAC 521)* the Tribunal allowed a licensees' appeal against a finding by Complaints Assessment Committee 521 (CAC 521) that they were guilty of unsatisfactory conduct in relation to their conduct in marketing a property to a purchaser who had entered into an unconditional agreement for sale and purchase.[9] At the time, the purchaser was 87 years old. CAC 521 recorded that there was no expert evidence of the purchaser's mental state, but referred to evidence from other real estate agents that he was "confused about his unconditional purchase".

[38] CAC 521 found that it was, or should have been, obvious to the licensees that the purchaser was vulnerable, or potentially vulnerable, and that they had failed to insert conditions into the agreement for sale and purchase to protect the purchaser's interests, and failed to send the agreement to the purchaser's solicitor before he signed it, and so breached rr 5.1 and 6.2 (which required them to act in good faith and deal fairly with all parties). CAC 521 also found that the licensees' conduct would likely bring the industry into disrepute, in breach of r 6.3.

[39] The Tribunal found that the purchaser's age was not in itself sufficient to require a reasonably competent licensee to take the steps referred to by CAC 521. It further found that on the evidence before it, CAC 521 had erred in finding that it was, or should have been, obvious that the purchaser was vulnerable or potentially vulnerable, such that those steps were required. The Tribunal observed that there was no real dispute that licensees must comply with all applicable Rules and statutory provisions, and that no one duty was predominant over others.[10]

[40] While r 9.8 was not referred to either before CAC 521 or the Tribunal, the purchaser's situation in *Molloy* was similar to that of Mr Davidson: both cases raise the issue of licensees' obligations prompted by particular characteristics of their customers: in *Molloy* as a result of the purchaser's age, and in the present case, as a result of Mr Davidson's stroke.

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9 *Molloy v The Real Estate Agents Authority (CAC 521)* [2020] NZREADT 29.
10 *Molloy*, at [50]–[51].

[41] Licensees' duties can co-exist under both r 5.1 and (in this case) r 9.8. The Rules are complementary, but one should not be considered to the exclusion of the other. The issue whether Mr Robb breached r 9.8 must be determined on the basis of what information was available to him, and what he did or did not do. That determination is required as the foundation as to what was "reasonably apparent" to Mr Robb. In that respect, this case is similar to that of *Deng*. If it is found that it was "reasonably apparent" to Mr Robb that Mr Davidson was suffering from a cognitive impairment, then the Tribunal will be required to determine whether Mr Robb took advantage of it.

Was the Committee required to make a finding as to Mr Davidson's capacity?

Submissions

[42] Ms Harkess submitted that the Committee was not required to make a finding about Mr Davidson's likely mental state, or his contractual capacity, at the time he sold the property, and the Tribunal has no jurisdiction to consider this issue raised in Mr Davidson's appeal. She submitted that competency and contractual capacity are legal questions, and if a person's capacity is at issue it is properly determined by the Court, not real estate agents going about their ordinary business.

[43] Ms Harkess further submitted that the Committee did not need to make findings about Mr Davidson's mental state or contractual capacity in order to determine whether Mr Robb failed to act in Mr Davidson's best interests by ignoring his state of health, or took advantage of Mr Davidson's inability to understand relevant documents. She submitted that the Committee accepted Mr Davidson's evidence that he had suffered memory loss and cognitive impairment, and did not need to go further and make a finding about his contractual capacity.

[44] Ms Entwistle submitted that the Tribunal has jurisdiction to consider evidence as to Mr Davidson's state of health. She submitted that the key issue in the appeal is whether Mr Robb ignored Mr Davidson's state of health, and that evidence as to his mental state is relevant to that determination.

[45] In her reply submissions, Ms Entwistle referred to Mr Davidson's references to his mental status in his complaint to the Authority, in which he said that he "was in a very confused state of mind", that Mr Robb "ignored my state of health just to secure a sale", and that he was "blamed for my lack of memory and concentration which is a result of my serious head injury".

[46] Ms Entwistle further submitted that the distinction sought to be made in Ms Harkess's submissions between "mental impairment" and "poor state of heath", did not assist Mr Robb. She submitted that "general health" includes "mental health", that the two are often inter-related (as in this case, where Mr Davidson's stroke had a bearing on his state of mind), and that in any event, the Committee specifically referred to Mr Davidson's "cognitive impairment". She submitted that there is no doubt that the Committee considered Mr Davidson's mental status.

[47] Ms Shaw submitted for the Authority that the issue of Mr Davidson's capacity was squarely put in issue in his complaint, where he said that he was in a "very confused state of mind" following his stroke, and that he had "no recollection" of signing the agency listing agreement. She further submitted that it is evident that the Committee considered the issue of capacity in the context of its assessment of Mr Robb's conduct, leading to its finding that while it seemed Mr Davidson had some cognitive impairment following the stroke, Mr Robb was not alerted to that fact.

[48] She submitted that the Tribunal has jurisdiction to consider the issue on appeal, and there is no need to take a narrow view as to a "capacity" inquiry. She submitted that the Committee had the matter before it, and made a finding. She submitted that the focus has to be on Mr Robb's conduct, and on what a reasonable licensee would have apprehended, and done.

Discussion

[49] The key issues for the Tribunal to determine are, first, what was reasonably apparent to Mr Robb as to Mr Davidson's state of health, and secondly, whether Mr Robb responded appropriately to Mr Davidson's condition (in particular, whether he took advantage of it).

[50] The Committee accepted that Mr Davidson had suffered "some cognitive impairment" as a result of the stroke. In order to determine whether the Committee was wrong to find that Mr Robb was "not alerted to" that cognitive impairment, it is necessary to know what Mr Davidson's state of health was, and what the signs of it were. Therefore, the Tribunal must consider the evidence before it as to Mr Davidson's state of health. The Tribunal is not required to make, and is not making, a determination whether or not Mr Davidson had "legal capacity"; it is considering what was reasonably apparent to Mr Robb, and whether he responded appropriately.

[51] We accept that an allegation that Mr Robb ignored Mr Davidson's state of health is not the same as an allegation that Mr Davidson did not have legal capacity. However, we are satisfied that the Tribunal has jurisdiction to consider the evidence relating to Mr Davidson's state of health, including that which would be relevant to the question of capacity, in order to identify the overt indications of his condition, and to determine whether those indications were reasonably evident to Mr Robb and whether Mr Robb responded appropriately.

Did the Committee err in finding that Mr Robb was not alerted to Mr Davidson's cognitive impairment?

Submissions

[52] Ms Entwistle accepted that there is a rebuttable presumption that a person who enters into a contract has the mental capacity to do so, but submitted that in any individual case there must be a fact-specific enquiry. She submitted that in the present case the focus must be on Mr Robb's position and the evidence as to the visible signs of Mr Davidson's impairment during Mr Robb's attendances in relation to the sale of the property. She summarised those signs (described in the clinical notes) as being visual impairment, loss of memory and forgetfulness, confusion, slow communication, loss of co-ordination and disorientation, a lack of concentration and ability for abstract reasoning, an inability to write and speak effectively, and fatigue.

[53] Ms Entwistle also referred to recorded observations by members of Mr Davidson's family, and friends. These included Ms Parker describing his speech as being slurred and confused, and Ms Meyer having said that Mr Davidson had been in

a very confused state of mind since his stroke, and she was very worried about his memory. She also referred to a statement from friends who visited him in hospital as to how "severely incapacitated" he was at a visit when he was in hospital, being agitated that "they took me out of the hospital to sign something" but he did not know what that was, and that he could not remember, when the friends visited a second time, that they had been there previously. Another couple found when they visited him in hospital that the "conversation got confusing", and Mr Berry said that Mr Davidson "would have been struggling to do anything".

[54] Ms Entwistle acknowledged that Mr Robb is not an expert on the effects of strokes or mental capacity, but submitted that Mr Davidson's impaired mental state was reasonably apparent, and should have alerted him to the fact that Mr Davidson was particularly vulnerable as a result of the stroke. She submitted that Mr Robb had expressly acknowledged Mr Davidson's vulnerability in his transaction report, and in email correspondence with Mr Davidson's solicitor.

[55] She further submitted that there was no evidence to support Mr Robb's assertion that he was told by Mr Davidson's daughter that they had been told by "the doctors" that Mr Davidson was not mentally incapacitated, and referred to Ms Meyer's statement that the hospital did not give them a medical assessment.

[56] Ms Harkess submitted that Mr Davidson's competency to manage his affairs was expressly considered by Mr Davidson, his daughters, and his medical team. She submitted that Mr Davidson's medical team "said to his daughters that he was capable and not mentally incapacitated", and that this is "best evidence" of his apparent competency.

[57] Ms Harkess also referred to Mr Robb's statement to the Committee in July 2018 that Mr Davidson "wished to remain in control and would not grant [an EPA]", and considered he was legally capable of making decisions as being "best evidence" of Mr Davidson's state of health at the time of the sale of the property. She further submitted that when Mr Robb wrote to Mr Davidson's solicitor (on 27 March 2018, when Mr Davidson asked for an extended settlement period) and said that "[Mr Davidson] stated he has no memory of [deciding to put the farm on the market]", he was recording what

Mr Davidson had told Mr Robb about his memory on that day, but that was not evidence of what Mr Robb knew or should have known at the time Mr Davidson entered into the agency agreement on 15 February 2018, or when he signed the agreement for sale and purchase on 28 February 2018.

[58] Ms Harkess also referred to Ms Meyer's statement (attached to an email sent to Mr Davidson's solicitor on 17 May 2019) that "we had no idea whatsoever of his limitations other than his sight and that he was able to live in the community with home help" as being objective evidence of what Mr Robb's apprehension of Mr Davidson's state of health was.

[59] She submitted that the evidence supported the Committee's finding that it was not "reasonably apparent" to Mr Robb that Mr Davidson did not understand the listing authority, or the agreement for sale and purchase. She submitted that Mr Robb was aware Mr Davidson had had a stroke, and appreciated that care needed to be taken and that he tired easily. She submitted that he was not aware during the listing and sale process that Mr Davidson had any cognitive impairment or memory issues, as he was not privy to Mr Davidson's medical information.

[60] Ms Shaw submitted that the issue is factual, and requires the Tribunal to consider the evidence that was before the Committee, and to decide whether the Committee reached the wrong decision. She summarised the evidence, and the further evidence admitted pursuant to the Tribunal's earlier ruling, and submitted that it was open to the Committee to reach the decision it did.

Discussion

[61] The evidence before the Committee as to the overt signs of Mr Davidson's mental state was as follows:

[a] Mr Davidson was commonly described by those who visited or dealt with him (whether hospital staff, family members, or friends) as being visually impaired showing loss of memory and forgetfulness, confusion, slow communication, loss of co-ordination and disorientation, a lack of

concentration and ability for abstract reasoning, an inability to write and speak effectively, and fatigue. Friends who visited him in hospital described him as being "severely incapacitated".

[b] Clinical staff (apparently) did not support invoking Mr Davidson's EPA. However, Mr Davidson's general practitioner, Dr Dyzel, said in a letter dated 3 March 2018 that she was concerned that Mr Davidson had signed legal documents without undergoing a competency assessment.

[c] Mr Robb knew Mr Davidson and had been his adviser for four years at the time the property was marketed and sold. He addressed the matter of Mr Davidson's state of health in his transaction report on 7 March 2018 (the day Mr Tapp counter-signed the agreement for sale and purchase):

> Vendor has had a stroke. Also suffers from short term memory loss, can remember everything about the farm, but has issues with recent events. His family is actively involved, and his lawyer is fully aware also. Possibility of [EPA] being enacted.

[d] In his response to the complaint (sent to the Authority around 10 July 2018), Mr Robb said:

> I knew [Mr Davidson] had suffered a stroke. After the first meeting I was aware that he got tired easily, that he was physically impaired, but that he was lucid and seemed mentally as sharp as he ever was (I have known him for a number of years). As far as I am aware, stroke victims do not necessarily suffer mental impairment. His daughters passed on to me that they had asked his medical professionals about his mental capacity and were told he was capable. He had excellent recall about the farm during the listing process. He asked intelligent questions and gave every indication he understood the answers. … I had no reason to believe that I was dealing with a mentally compromised person, and he had good support around him. …

[62] The Tribunal has before it additional evidence, being a copy of the clinical notes, Mr Kennedy's report (prepared from a review of Mr Davidson's medical records) and Ms Meyer's statement. We record that following his review of the clinical records, Mr Kennedy concluded:

> Self and third-party report, including multiple sources in the reviewed records, document the presence of significant memory and other cognitive defects being present during [Mr Davidson's] inpatient stay in January-February 2018, as a consequence of the CVA (stroke).

…

> It is unlikely that Mr Davidson would have been able to retain essential information relevant to signing the sale and purchase agreement, due to significant memory deficits, the extent of which would have made it less than likely he would have been able to use or weigh that relevant information. He would not have been able to communicate that decision reliably in writing but would have been able to do so verbally or by other means.
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> In plain language, at the time the sale and purchase agreement was signed and at any earlier [negotiation] or discussion, Mr Davidson would have struggled to pay adequate attention to, comprehend and remember any complex information, whether this was presented in written or spoken form.
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> …

[63] We also note Ms Meyer's statement that the hospital would not give authority for the EPA to be invoked, but she and her sister did not receive a medical assessment of Mr Davidson from the hospital, and that "very limited information" was supplied by the hospital. There is no record in the hospital notes of Mr Davidson's family being told either that he had, or did not have, capacity to enter into a legal agreement.

[64] We do not accept Ms Harkess's submission that Mr Robb's prepared statement to the Authority, in response to the complaint, that Mr Davidson was "lucid" and "mentally as sharp as he ever was", is "best evidence" of Mr Robb's apprehension of Mr Davidson's state of health. What Mr Robb said at the time of the agreement for sale and purchase (that Mr Davidson suffered from short term memory loss, and that there was a possibility of the EPA being invoked), is a more reliable indication, and that indicates some concern as to Mr Davidson's condition.

[65] Ms Harkess's submissions for Mr Robb also placed great weight on the hospital's opinion that the EPA should not be invoked as being "best evidence" as to Mr Davidson's state of health. We have recorded earlier that there is no evidence of this opinion having been expressed, or of any of the medical staff having given an opinion that Mr Davidson was "capable". Further, as Ms Harkess also submitted, an EPA relates to "legal capacity": pursuant to s 93A(1) of the Protection of Personal and Property Rights Act 1988, it allows the named "attorney" to act if the "donor" is "mentally incapable". Rule 9.8 refers only to an "inability to understand relevant documents". That the hospital appears not to have considered there were grounds to invoke the EPA, and Mr Davidson's daughters accepted that opinion, does not mean

that Mr Davidson's state of health was not such that relevant obligations under the Act and Rules (in particular, r 9.8) might be triggered.

[66] We accept that Mr Robb was not qualified to make an assessment of Mr Davidson's legal capacity, but he had known Mr Davidson for many years, and on his own evidence, was able to recognise some impairment in his ability to understand documents. On the balance of probabilities, we find that the signs of Mr Davidson's impairment should reasonably have been as apparent to Mr Robb as they were to others who knew him. In the circumstances of this case a reasonably competent licensee acting with the requisite skill, care, competence, and diligence in compliance with r 5.1 would have recognised the need to proceed with caution and, in particular, to ensure that there was no breach of r 9.8.

Did Mr Robb breach rr 5.1 and/or 9.8?

Submissions

[67] Ms Entwistle submitted that Mr Robb "failed to undertake a proper competency assessment, relying instead on his own informal assessment." She submitted that Mr Robb should have verified for himself that Mr Davidson was not pressured and properly understood the consequences of what he was agreeing to. While acknowledging that Mr Robb is not an expert on strokes or mental capacity, she submitted that he failed to take extra care. She submitted that Mr Robb could have advised Mr Davidson to have an assessment undertaken, spoken to his daughters to this effect, or not agreed to market the property until Mr Davidson's mental state was clarified. She submitted that Mr Robb was not limited in any way.

[68] Ms Harkess submitted that Mr Robb discussed Mr Davidson's competency with his daughters, and she referred to Mr Robb's evidence that they told him the medical team had said that Mr Davidson had mental capacity. She submitted that Mr Robb did not deal with Mr Davidson alone when he was in hospital, and that his daughters and Mr Berry were present when the decision was made to put the property on the market. She submitted that Mr Davidson made that decision himself, and the fact that he was reluctant is not relevant to the question whether he was in a fit state of health to do so.

[69] Ms Harkess submitted that Mr Robb exercised an appropriate level of care for a person in a vulnerable position. She submitted that Mr Robb had not ignored Mr Davidson's state of health, he recommended that he take legal advice and Mr Davidson's solicitor was involved.

Discussion

[70] In the present case, Mr Davidson's situation was discussed with Mr Davidson, his daughters, and Mr Berry. Mr Davidson agreed that the property was to be sold, and he agreed to the sale to Mr Tapp. Mr Davidson was supported by his family, he was receiving independent legal advice from his solicitor, and from Mr Berry.

[71] While Mr Robb could have suggested to Mr Davidson that he have a competency assessment, and he could have discussed the situation with, and been advised by, his manager at the Agency, we are not persuaded that he could have taken any further steps. We accept that he could not have required Mr Davidson to have a competency assessment, and that he did not have access to the hospital records. We are not persuaded that this was a case where Mr Robb should have refused to act on the sale.

[72] Accordingly, while we have concluded that the Committee erred in finding that Mr Davidson's cognitive impairment was not reasonably apparent to Mr Robb, we are not persuaded that Mr Robb failed to exercise skill, care, competence, and diligence, or that he took advantage of Mr Davidson's impairment. We are not persuaded that he breached rr 5.1 or 9.8.

Did the Committee err in finding that Mr Robb did not fail to follow Mr Davidson's instructions as to advertising the property?

Submissions

[73] Ms Entwistle submitted that despite agreeing to do so, Mr Robb failed to follow Mr Davidson's instructions to market the property nationally, and the property was not promoted or advertised at any stage. While noting that there were conflicting submissions as to the reason why the property was not advertised (that there was limited time available, work was needed on the property, and there was an agreement

to deal with Mr Tapp), she submitted that there would have been considerable interest if the property had been advertised.

[74] Ms Harkess submitted that the Committee correctly inferred that there was not enough time to advertise the property nationally. She submitted that Mr Davidson agreed that Mr Robb would first deal with Mr Tapp, and if a deal could not be reached, he would market the property for sale by tender. She also submitted that Ms Meyer's statement confirms that work needed to be done on the property and the house before it could be marketed. She submitted that photographs of the property submitted on behalf of Mr Davidson had been taken the day before the sale was settled in June 2018, after remedial work had been done.

[75] Ms Shaw submitted that there did not appear to be any correspondence concerning marketing the property, and it was open to the Committee to infer that Mr Robb intended to advertise it, but events moved quickly because of the decision to deal with Mr Tapp, and the decision to pause marketing while remedial work was done. She submitted there was no evidence of a deliberate decision not to market the property.

Discussion

[76] We are required to consider r 9.1 which provides that:

> A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

[77] When the property was listed with Mr Robb, Mr Davidson's instructions, and Mr Robb's intention, were that it would be advertised nationwide. When Mr Tapp's offer was received it was agreed that Mr Robb would work with him to see if a deal could be reached, Mr Davidson accepted Mr Tapp's offer, and the property was not marketed further. It would have been best industry practice for Mr Robb to have Mr Davidson to confirm that the property would not be marketed while Mr Tapp's offer was being considered. There is no evidence Mr Robb obtained this confirmation, or considered obtaining it. However, we are not persuaded that the Committee was wrong to accept that events overtook the parties' intentions, in particular the approach from Mr Tapp.

[78] Further, there is force in the submissions for Mr Robb and the Authority that work needed to be done before the property could be marketed and this was not, and could not have been, done before Mr Tapp's offer was received. While we note the submission for Mr Davidson that the property was in excellent condition, we also note Ms Harkess's submission that the photographs presented to the Committee in support of that submission were taken the day before settlement (after work had been done) and do not necessarily show the condition of the property at the time Mr Robb presented the offer from Mr Tapp.

[79] In the circumstances, while we would recommend that licensees obtain appropriate instructions from a vendor client if agreed marketing is not to be undertaken, we are not persuaded that in the present case Mr Robb's failure to advertise the property requires a disciplinary response.

Did the Committee err in finding that Mr Robb did not apply pressure on Mr Davidson to accept Mr Tapp's offer?

Submissions

[80] Ms Entwistle submitted that despite being clearly on notice as to Mr Davidson's manifest competency issues, Mr Robb pressured Mr Davidson to accept the first offer on the farm without allowing him sufficient time to consider his position. She submitted that Mr Robb admitted that there was pressure on Mr Davidson to sign the agreement for sale and purchase, before Mr Tapp (who was looking at other properties) lost interest and withdrew his offer. She also pointed to Mr Davidson's solicitor's statement in an email to Mr Robb that "there was pressure on [Mr Davidson] to sign".

[81] Ms Entwistle submitted that the reason for the pressure is irrelevant, and that Mr Robb should have verified for himself that Mr Davidson was not pressured, and understood the consequences of what he was doing. She submitted that he should have advised Mr Davidson to seek further advice if necessary but instead of doing so, he pressured Mr Davidson to accept Mr Tapp's offer.

[82] Ms Harkess submitted that it is accepted that some pressure is normal in a real estate transaction, and that Mr Davidson has to establish that there was "undue or

unfair pressure". She submitted that r 9.2 contemplates that a licensee may engage in legitimate pressure, and whether conduct amounts to "undue or unfair pressure" is considered objectively. She submitted that the question is whether Mr Robb's actions "overpowered" Mr Davidson so that he lost the volition to act in his own interests.[11]

[83] Ms Harkess submitted that the "pressure on [Mr Davidson] to sign" referred to in the solicitor's email is not a reference to "undue pressure" applied by Mr Robb. Rather, it is a reference to pressure applied by the purchaser, Mr Tapp, who was considering other properties. She submitted that it does not necessarily constitute illegitimate pressure to say to a vendor client "there is a risk of losing this offer". She submitted that in doing this Mr Robb was accurately conveying the information that Mr Tapp was looking at other properties, and there was a risk of losing his offer if Mr Davidson delayed, and Mr Robb would have been in breach of his obligation (under r 9.3) to keep Mr Davidson informed of relevant matters if he had not passed on Mr Tapp's comment.

[84] Ms Harkess also referred to the fact that there was a period of five days between receipt of the offer and Mr Davidson's signing the agreement for sale and purchase, during which time Mr Davidson had sufficient time to consider his position, and consulted with his daughters, Mr Berry, and his solicitor (leading to the insertion of an amended clause). She submitted that there was then a further nine days before Mr Tapp counter-signed the agreement accepting the amended clause, during which Mr Davidson could have withdrawn his counter-offer if he did not want to proceed with the sale.

[85] Ms Shaw submitted that the test of "undue or unfair pressure" is a high one, and a complainant must do more than simply state that she or he felt pressured.[12] She submitted that in reaching its conclusion that there was no "undue or unfair pressure" put on Mr Davidson, the Committee considered Mr Robb's evidence that he had various conversations with Mr Davidson in relation to Mr Tapp's offer, the evidence that Mr Davidson's daughters, his solicitor, and Mr Berry were present during

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11 Citing the Tribunal's decision in *du Fresne v The Real Estate Agents Authority (CAC 409)* [2019] NZREADT 6, at [81].

12 Citing *du Fresne*, at [8].

discussions regarding the transaction, and that Mr Davidson signed the agreement for sale and purchase at his solicitor's office five days after the offer was received.

[86] Ms Shaw submitted that while it can be accepted that there was pressure, an evaluation of all the factual circumstances is required to determine whether such pressure was "undue or unfair".

Discussion

[87] This issue requires consideration of r 9.2, which provides:

> A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

[88] In order for r 9.2 to apply, it must be established that the licensee has engaged in conduct that constitutes "undue or unfair pressure". Real estate transactions will often be stressful, and clients and customers will often feel under pressure. Such stress and pressure will not generally lead to a disciplinary response. The Tribunal was referred to three Tribunal decisions involving allegations of "undue or unfair pressure". They demonstrate that the threshold for "undue and unfair pressure" is a high one, and that the determination is made on the particular facts and circumstances of each case.

[89] In *Murphy v Real Estate Agents Authority (CAC 301)*,[13] the Tribunal found that a licensee had misled prospective purchasers of a property that they had a pre-auction bidding rival, such that they needed to make their best offer without delay, in order to secure the property. There was no such rival. The Tribunal found that the licensee's conduct was in breach of r 9.2 (and other Rules).

[90] In *Millward v Real Estate Agents Authority (CAC 304)*, the appellant vendors had complained that a licensee over-pressured them to lower the asking price for their property.[14] They said that the licensee had beaten them down with "pressure upon pressure" so that they agreed to sell their property for $50,000 less than they intended.

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13 *Murphy v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 44.
14 *Millward v Real Estate Agents Authority (CAC 304)* [2015] NZREADT 58

The Tribunal recognised that "building up a modest degree of pressure" was not unusual, and was not satisfied that "undue or unfair pressure" had been applied.[15]

[91] In *du Fresne*, the Tribunal rejected the appellant's claim that a licensee put "undue or unfair pressure" on her to sell her property by tender, to do maintenance and improvement work on the property, and to accept a tender offer.[16]

[92] In the present case, we are not satisfied that Mr Robb put "undue of unfair pressure" on Mr Davidson to accept Mr Tapp's offer. He correctly passed on information that Mr Tapp was looking at other properties, which meant that there was pressure on Mr Davidson in order to avoid losing the offer, but that does not constitute "undue or unfair pressure".

Was Mr Robb's appraisal of the property inadequate?

Submissions

[93] In answer to a submission on behalf of Mr Robb, Ms Entwistle submitted that it is within the Tribunal's jurisdiction, and relevant to Mr Davidson's appeal, to consider whether Mr Dobb's appraisal of the farm was adequate. She submitted that the appraisal was inconsistent with the market for dairy farms at the time, and the condition of property and its improvements. She referred to the rating valuation of the farm as at 1 September 2017 at $1.93 million, and an earlier rating valuation of $2.3 million

[94] Ms Harkess submitted that the Tribunal has no jurisdiction to consider this issue, and Mr Davidson is trying to advance a completely new case. She submitted that there was no allegation as to an inadequate appraisal in Mr Davidson's complaint.

[95] Ms Shaw also submitted that the adequacy of the appraisal was not part of Mr Davidson's complaint. She further submitted that no evidence had been put forward to support his contention that the appraisal was incorrect.

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15 *Millward*, at [67]–[68], [70]–[71].
16 *du Fresne v The Real Estate Agents Authority (CAC 409)*, fn 11, above.

Discussion

[96] We agree with the submissions for Mr Robb and the Committee that this is not a legitimate appeal point. There was no complaint about Mr Robb's appraisal, and no finding by the Committee. We also agree that there is no evidence that the appraisal was defective, as being inconsistent with the market, or low.

Outcome

[97] In the light of the findings set out above, it is not necessary to consider the submissions on behalf of Mr Davidson as to relief. His appeal is dismissed.

[98] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Ms C Sandelin
Member